IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 5292 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE H.K.RATHOD

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

BABUBHAI GANDABHAI KAPDIYA - Petitioner(s)
Versus
THE STATE OF GUJARAT & 2 - Respondent(s)

==========

Appearance :
MR BL TRIVEDI for Petitioner(s) : 1,
Mr. LB Dabhi AGP for Respondent(s) : 1,
None for Respondent(s) : 2 - 3.

==========

CORAM : HONOURABLE MR.JUSTICE H.K.RATHOD

Date : 02/03/2007

ORAL JUDGMENT

1. Heard learned Advocate Mr. BL Trivedi for petitioner and Mr. LB Dabhi, learned AGP for Respondent No.1.

2. Through this petition under Article 227 of the Constitution of India, petitioner challenges order passed by the Gujarat Secondary Education Tribunal Ahmedabad dated 28.10.05 in Application NO. 203 of 2004 wherein the Tribunal has rejected the said application. The petitioner was claiming suspension allowance on the basis of the plea of deemed suspension.

3. It is submitted by the learned Advocate Mr.BL Trivedi before this Court that when the petitioner was facing criminal prosecution in respect of murder case, he was detained in custody for more than 48 hours, therefore, petitioner is deemed to have been placed under suspension and, therefore, petitioner is entitled for suspension allowance from the date of detention till the date on which he was reinstated in service. It is also submitted by the learned Advocate Mr. Trivedi before this Court that in other Government services, those who are working in the State

Government as well as under the District Panchayats, they are entitled for such suspension allowance on the basis of deeming fiction of suspension when such employee has been detained in custody exceeding 48 hours.

4. Looking to the facts of this case, petitioner was working with the school management with effect from 15.6.87 as Assistant Teacher. Thereafter, he was promoted as Head Master in the very same school. Thereafter, because of the filing of the FIR bearing CR NO. 141 of 2002 on 13.12.2002 for the offences punishable under section 147, 148, 149 and 302 of the Indian Penal Code and section 2(5) of the Scheduled Castes and Scheduled Castes (Prevention of Atrocity) Act and section 135 of the Bombay Police Act, from 14.12.2002, the petitioner had remained absent from the school and was absconding for some period. Petitioner was nabbed on 17.1.2003 and was sent to judicial custody as an under trial prisoner. As per the facts of the present

case, no order placing the petitioner under suspension was passed by the School Management and since the petitioner was not able to attend the school on account of his incarceration, on instructions, his salaries were stopped by the DEO. The petitioner had thereafter send his application on 4.8.2004 by RPAD claiming salaries from January, 2003 on the ground that he should be deemed to have been placed under suspension in view of his detention in judicial custody. As per the facts of the case of the petitioner, as the management was initially not responding to the notices isued by the tribunal, on 30.9.2004, the tribunal had passed interim order directing the management to pay petitioner's salaries considering him to be under deemed suspension and immediately after passing of the said order by the tribunal, Misc. Application (Exh.7) was filed by the management for vacating interim relief and the reply was also filed. Ultimately, after

hearing both the sides, the Tribunal rejected the application of the petitioner by passing the order under challenge and, therefore, present petition has been filed by the petitioner before this Court. After considering the submissions made from both the sides,the tribunal came to the conclusion that in absence of service rules as to how much amount is to be paid to an employee under suspension, during pending departmental inquiry employee concerned is entitled for full salary as suspension allowance, meaning thereby, if an employee has been placed under suspension during pending departmental inquiry and if there is no rules for any particular amount of suspension, then, concerned employee is entitled for full wages as suspension allowance. However, in the case before hand, the Management has not passed any order placing the petitioner under suspension. So, in absence of the order of suspension against the petitioner, whether

the petitioner is entitled for suspension allowance or not, that question has been rightly examined by the tribunal that in case of employee concerned detained in judicial custody in respect of criminal prosecution for more than 48 hours, there is no provision made for deemed suspension under the rules and Act and, therefore, petitioner is not entitled for the benefit of deemed suspension in view of the fact that he was detained in custody for more than 48 hours. This aspect has been examined by the Tribunal in para 5 and 8 of the judgment as under:

> “5. From the facts noticed and the submissions recorded hereinabove, it becomes explicitly clear that the applicant is not attending the school from 14/12/2002 on account of his detention in judicial custody in connection with a criminal case. The management has not passed any order of suspension and on the principle of “ no work no pay “ his salaries are stopped from January 2003 onwards. Secondary education in the State of Gujarat is regulated by Gujarat Secondary Education Act 1972 ('Act' for brevity). The service conditions of the employees of registered private secondary schools are prescribed under the Act and the Regulations. Admittedly, neither the Act

nor the Regulations provide for 'deemed suspension'. No rules are framed regulating the payment of subsistence allowance while an employee is placed under suspension. In view of the settled legal position as laid down in R.P.Kapur Vs. UOI reported in AIR 1964 SC 787, Balvantray Ratilal Patel Vs. State of Maharashtra reported in AIR 1968 SC page 80 and has ruled in the case of Cap. M. Paul Anothony Vs. Bharat Clamps Ltd. And Anor. reported in (1994) 3 SCC 679, if there is no provision regulating the payment of subsistence allowance then the public servant or an employee is entitled to receive full emoluments during the period of suspension. The employees of private secondary school are, therefore, entitled to receive full emoluments which under suspension. In the present case, no order of suspension is passed and the applicant is not able to attend the school on account of his detention in jail. The salaries are stopped on the principle of 'no work no pay'. There are no rules regarding deemed suspension. Sec. 36(3) of the Act makes a provision for suspension but I do not find any scope of reading deemed suspension in the said provision. I am aware that most of the disciplinary proceedings applicable to various public servants provide for deemed suspension where an employee is detained in custody or a criminal charge or otherwise for continuous period exceeding 48 hrs. In the present case, as stated hereinabove, rules do not provide for deemed suspension. In my view, it is not possible to accept the submissions of applicant that he should be deemed to have been placed under suspension in view of his detention in the custody exceeding 48 hrs.

8. From the discussion made

hereinabove, it is apparent that for want of rules regarding deemed suspension, it is not possible to hold that the applicant was deemed to have been placed under suspension in view of his arrest. The claim of the applicant is therefore, negatived. In view of the fact that the applicant is facing prosecution and is having large family to maintain, without there being any other source of income, this forum feels that if the leave is available to the credit of the applicant and the applicant if so desires can make an application to the school and school management may adjust the period of his absence against the leave in accordance with rules and on that basis the salaries which he will be entitled may be released. In the fact, situation, except these observations, nothing more can be done for the applicant.

In the result, this application is dismissed. For want of specific rule or provisions or guideline it is not possible to hold that the applicant was deemed to have been placed under suspension on account of his detention in prison for a period of exceeding 48 yrs. The interim order passed on 30/9/2004 directing the management to pay the salaries to the applicant on the basis of deemed suspension is hereby recalled. The Education deptt. of State govt. is recommended consider making the provisions regarding deemed suspension. The Register of this Tribunal is directed to send a copy of this judgment to the Secretary, Education deptt. by R.P.A.D. and maintain the acknowledgment receipt in this file. No order as to costs."

5. In view of the aforesaid discussion made by the Tribunal and considering the observations made by the tribunal and also in light of the

undisputed facts, one that the management has not passed any orders placing petitioner under suspension and second, that there is no provision in the Act and Rules about the deemed suspension in case of custody of an employee exceeding 48 hours, according to my opinion, tribunal is justified in passing the order in question and no error has been committed by the Tribunal in passing the order in question. Tribunal was right in coming to the conclusion that the petitioner is not entitled for any amount of suspension allowance on the basis of deemed suspension.

6. According to my opinion, this court is having very limited jurisdiction under Article 227 of the Constitution of India to interfere with the orders of such a nature and this court cannot act as an appellate court. Even in case when two views are possible, this court cannot interfere with such orders unless and until it is established that the findings given by the tribunal are perverse

and contrary to law. Therefore, according to my opinion, order in question does not call for any interference under Article 227 of the Constitution of India.

7. Therefore, there is no substance in this petition and same is, therefore, dismissed in limine.

(H.K. Rathod,J.)

Vyas